

1 **UNITED STATES DISTRICT COURT**2 **DISTRICT OF NEVADA**

3 ROBERTO DURAND,

Case No.: 3:21-cv-00169-MMD-WGC

4 Plaintiff

**Report & Recommendation of
United States Magistrate Judge**

5 v.

Re: ECF No. 1, 1-1

6 LORIN M. TAYLOR,
LYNN BIGLEY,

7 Defendants

9 This Report and Recommendation is made to the Honorable Miranda M. Du, United
10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
11 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff, who is incarcerated within the Nevada Department of Corrections (NDOC), at
13 Ely State Prison (ESP), has filed an application to proceed in forma pauperis (IFP) (ECF No. 1)
14 and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION

16 A person may be granted permission to proceed IFP if the person “submits an affidavit
17 that includes a statement of all assets such [person] possesses [and] that the person is unable to
18 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
19 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

21 The Local Rules of Practice for the District of Nevada provide: “Any person who is
22 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
23 The application must be made on the form provided by the court and must include a financial
affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

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2 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
3 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
4 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
5 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

6 An inmate submitting an application to proceed IFP must also “submit a certificate from
7 the institution certifying the amount of funds currently held in the applicant’s trust account at the
8 institution and the net deposits in the applicant’s account for the six months prior to the date of
9 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
10 at the institution for less than six months, “the certificate must show the account’s activity for
11 this shortened period.” LSR 1-2.

12 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
13 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
14 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
15 deposits or the average monthly balance for the six-month period immediately preceding the
16 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
17 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
18 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
19 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
20 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

21 Plaintiff’s certified account statement indicates that his average monthly balance for the
22 last six months was \$4.79, and his average monthly deposits were \$16.67.

1 Plaintiff's application to proceed IFP should be granted. Plaintiff is required to pay an
 2 initial partial filing fee in the amount of \$3.33 (20 percent of \$16.67). Thereafter, whenever his
 3 prison account exceeds \$10, he must make monthly payments in the amount of 20 percent of the
 4 preceding month's income credited to his account until the \$350 filing fee is paid.

5 **II. SCREENING**

6 **A. Standard**

7 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
 8 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
 9 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
 10 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
 11 § 1915(e)(2)(A), (B)(i)-(iii).

12 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
 13 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
 14 which a prisoner seeks redress from a governmental entity or officer or employee of a
 15 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
 16 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
 17 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
 18 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

19 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 20 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 21 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
 22 complaint under these statutes, the court applies the same standard as is applied under Rule
 23 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule

1 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
2 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

3 The court must accept as true the allegations, construe the pleadings in the light most
4 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
5 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
6 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
7 (1980) (internal quotation marks and citation omitted).

8 A complaint must contain more than a "formulaic recitation of the elements of a cause of
9 action," it must contain factual allegations sufficient to "raise a right to relief above the
10 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
11 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
12 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
13 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
14 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 A dismissal should not be without leave to amend unless it is clear from the face of the
16 complaint that the action is frivolous and could not be amended to state a federal claim, or the
17 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
18 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

19 **B. Plaintiff's Complaint**

20 Plaintiff's complaint names attorneys Lorin Taylor and Lynn Bigley. Plaintiff's
21 allegations are not clear, but he refers to these advocates taking his records, researching his case
22 and giving legal advice and calls after he told them he was not a patient. He contends there was a
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1 denial of legal assistance. Plaintiff states that these attorneys are employed by NDALC, which is
 2 the Nevada Disability Advocacy and Law Center.

3 42 U.S.C. § 1983 provides a mechanism for the private enforcement of substantive rights
 4 conferred by the Constitution and federal statutes. Section 1983 “is not itself a source of
 5 substantive rights, but merely provides a method for vindicating federal rights elsewhere
 6 conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotation marks and citation
 7 omitted). To state a claim under section 1983, a plaintiff must allege: (1) his or her civil rights
 8 were violated, (2) by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42,
 9 48-49 (1988).

10 The court takes judicial notice that NDALC is a private, non-profit organization. *See*
 11 <https://www.ndalc.org/>, last visited August 5, 2021.

12 These defendants are not state actors subject to suit under section 1983. *See Price v.*
 13 *Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991) (private parties do not act under color of state
 14 law). Therefore, this action should be dismissed with prejudice.

15 III. RECOMMENDATION

16 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

17 (1) **GRANTING** Plaintiff’s IFP application (ECF No. 1); however, Plaintiff is required
 18 to pay, through NDOC, an initial partial filing fee in the amount of \$3.33, within thirty
 19 days of the entry of any order adopting and accepting this Report and Recommendation.
 20 Thereafter, whenever his prison account exceeds \$10, he is required to make monthly
 21 payments in the amount of 20 percent of the preceding month’s income credited to his
 22 account until the full \$350 filing fee is paid. This is required even if the action is
 23 dismissed, or is otherwise unsuccessful. The Clerk should be directed to **SEND** a copy of

1 an order adopting and accepting this Report and Recommendation to the attention of
2 **Chief of Inmate Services for the Nevada Department of Corrections**, P.O. Box 7011,
3 Carson City, Nevada 89702.

4 (2) The complaint (ECF No. 1-1) should be **FILED**.

5 (3) The action should be **DISMISSED WITH PREJUDICE**.

6 Plaintiff should be aware of the following:

7 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
8 this Report and Recommendation within fourteen days of being served with a copy of the Report
9 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
10 Report and Recommendation” and should be accompanied by points and authorities for
11 consideration by the district judge.

12 2. That this Report and Recommendation is not an appealable order and that any notice of
13 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
14 until entry of judgment by the district court.

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16 Dated: August 5, 2021

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18 William G. Cobb
United States Magistrate Judge
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